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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
In Local Telecommunications Markets	)	
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's Rules	)	
to Preempt Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas Designed	)	
To Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
to Preempt State and Local Imposition of	)	
Discriminatory And/Or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION AND SOUTHERN COMPANY

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EXECUTIVE SUMMARY

In 1997, after receiving more than 50 formal comments and 220 informal comments and reply comments, the Federal Communications Commission determined it would not adopt a federal mandatory access requirement for multi-tenant buildings. Now, a scant two years later, the Commission has opened a brand new rulemaking proceeding to reverse this determination. This is not rational agency practice.

The current Notice of Proposed Rulemaking proceeding includes, *inter alia*, new rules to implement the 1996 amendments to the Pole Attachment Act, Section 224 of the Communications Act of 1934. However, the Commission has already addressed new rules for Section 224 in *three* separate rulemakings. None of these rulemakings has yet come to closure. In addition, Section 224 itself is subject to a constitutional challenge in *Gulf Power Co. v. FCC*, No. 98-2403, currently pending decision in the Eleventh Circuit.

The unsettled state of the pole attachment statute's implementation creates considerable hardships for utility companies. Rational agency practice, along with the interests of justice and fundamental fairness, mandates that the three pending pole attachment rulemaking proceedings and the constitutional challenge to the statute should be completed before the Commission embarks on yet another rulemaking on Section 224.

In the event the Commission nonetheless elects to proceed with this

rulemaking, it should be noted that the "problem" the Commission seeks to address is alleged obstructionist conduct by *building owners* and *incumbent LECs*, not electric utilities. Since electric utilities are not part of the problem, they should not be swept into the solution. The Commission should apply Section 251, which mandates access requirements only for LECs, not Section 224, which also includes electric utilities.

Assuming, *arguendo*, electric utilities are addressed, there are physical characteristics of electric utility infrastructure that preclude their use as a "solution" to the problem of access to multi-tenant environments. First, in the majority of cases, the electric utility's wires and associated equipment terminate *outside* the building. The demarcation or delivery point is *outside* the building. Everything *inside* the building is typically owned by the customer. Thus, in most cases, including electric utilities in the proposed solution will not even begin to address the alleged problem. In buildings where electric utility wires and equipment extend inside the building, safety and engineering considerations mandate that electric wires and communications wires are kept separate. Communications wires cannot occupy the same pathways used for electric wires. Even assuming they could, electric utilities do not have a legal right to grant third party carriers the right to run communications wires in these pathways.

The Commission proposes to characterize the right to place an antenna on a rooftop as a "right-of-way" within the meaning of Section 224. However, the right to place an antenna on a rooftop is *never* a right-of-way. The right to place an antenna on a rooftop is either a license or a lease. Neither of these is a right-of-way. Even

assuming, *arguendo*, that the grant of the right to place an antenna on a rooftop were a right-of-way, no access for third parties would be permitted. The scope of a right-of-way is determined by the grant. Typically, contracts granting the right to place an antenna on a rooftop are limited to the right to affix specific equipment on the rooftop. No additional equipment is permitted.

The Commission's misguided proposals to characterize the right to place an antenna on a rooftop as a right-of-way fail for yet another reason, to wit, that Section 224 does not cover wireless equipment. The Commission's conclusion to the contrary currently is being challenged in the Eleventh Circuit in *Gulf Power Company, et al. v. FCC*, Case No. 98-6222.

Finally, the Commission's proposal that "rights-of-way" should include property owned by a utility used "in the manner" of a right-of-way is completely unwarranted. A right-of-way and fee ownership are mutually exclusive concepts under property law. You can have one or the other, a right-of-way or a fee simple. You can't have both.

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COMMENTS OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION AND SOUTHERN COMPANY

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Southern Company (collectively, the Electric Utilities"), by and through undersigned counsel and pursuant to Section 1.415[1]

[1] 47 C.F.R. § 1.415.

of the rules and regulations of the Federal Communications Commission ("FCC" or Commission"), respectfully submit the following comments in response to the above-captioned Notice of Proposed Rulemaking.[2]

STATEMENT OF INTEREST

The Electric Utilities are investor-owned utilities engaged in the generation, transmission, distribution and sale of electric energy. Collectively, their service territories span multiple regions of the United States and together they provide electric service to millions of residential and business customers. The Electric Utilities own electric energy distribution systems that include distribution poles, conduit, ducts and rights-of-way, all of which are used to provide electric power service to their customers. Portions of this infrastructure, particularly distribution poles, are used in part, for wire communications. To the extent that such distribution infrastructure is offered voluntarily and used for wire communications and the state has not preempted the FCC's jurisdiction, the Electric Utilities are subject to regulation by the Commission under the

[2] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc., Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscribers Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, Cellular Telecommunications Industry Association Petition for Rule Making and Amendments of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WT Docket No. 99-217 and CC Docket No. 96-98, *Notice of Proposed Rulemaking*, FCC 99-141 (released July 7, 1999) (the "*NPRM*").

Pole Attachments Act.[3]

I. PRELIMINARY STATEMENT

In 1997, after receiving more than 50 comments and 220 informal comments and associated reply comments, the Commission determined it would not adopt a federal mandatory access requirement for multiple tenant buildings.[4] Now, a scant two years later, the Commission has opened a brand new rulemaking proceeding to address this same issue. This is not rational agency practice.

Many of the related issues raised in this proceeding also have already been addressed in recent rulemakings. For example, the Commission has already decided that rooftops are not covered by Section 224.[5] Teligent, WinStar and others have tried repeatedly to convince the Commission in other proceedings that mandatory access to

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[3] 47 U.S.C. § 224 (1997), as amended by § 703 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 104 Stat. 56, 149-51, signed February 8, 1996. Some of the Electric Utilities provide energy service in states that have preempted the Commission's jurisdiction under § 224 by making the certification required by 47 U.S.C. § 224(c)(2) and are, therefore, subject to state regulation of pole attachments. Nonetheless, because the federal statute serves as a loose "benchmark" for pole attachment and related issues, all of the Electric Utilities have a significant interest in the Commission's actions concerning such issues.

[4] *In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 95-184 and MM Docket No. 92-260, *Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 3659, ¶ 178 (1997).

[5] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, ¶ 1185 (1996) (the "*Local Competition Order*").

privately owned buildings and rooftops is required under Section 224.[6] Since the Common Carrier Bureau and the Cable Services Bureau have rejected these wireless carriers' interpretation of Section 224, these same carriers have now decided to see if they can have better luck with the Wireless Telecommunications Bureau.

Similarly, in 1998 the Commission established a definition of conduit as meaning "a pipe placed in the ground in which cables and/or wires may be installed."[7] The Commission established this definition in response to a full notice and comment rulemaking. None of the nine parties seeking reconsideration of this decision questioned the Commission's definition of "conduit" as being underground.[8] It is utterly capricious to propose to change this definition less than one year later in a new rulemaking.

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[6] *See, e.g.,* Filings of WinStar and Teligent, In *the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 95-184 and MM Docket No. 92-260; Filings of WinStar, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket No. 98-146; Filings of WinStar and Teligent, *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, and Filings of WinStar and Teligent, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98.

[7] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777, ¶ 103-116 and Appendix A (1998) (the "*Post-2001 Order*")

[8] *See* Petitions for Reconsideration filed on April 13, 1998 in WT Docket No. 97-151 by Bell Atlantic, EEI, ICG, MCI, NCTA, SBC, Teligent, USTA and US West. In fact, these petitioners themselves refer to conduit as underground. *See, e.g.*, MCI Petition for Reconsideration at 19 ("Conduits are horizontal, buried structures.").

The NPRM proposes new rules to implement the 1996 amendments to Section 224 of the Communications Act of 1934. However, the Commission already has addressed the 1996 amendments to Section 224 in *three* separate rulemakings. These include (1) CC Docket No. 96-98 (*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*); (2) CS Docket No. 97-98 (*Amendment of Rules and Policies Governing Pole Attachments*); and (3) CS Docket No. 97-151 (*Implementation of Section 703(e) of the Telecommunications Act of 1996*).

None of these rulemakings has yet come to closure. The pole attachment rules issued in the first proceeding, CC Docket No. 96-98, have been under reconsideration by the Commission for three years. CS Docket No. 97-98 has been open for more than two years, with no order yet issued. The pole attachment rules issued in the third proceeding, CS Docket No. 97-151, currently are under two types of review. A portion of the rules are subject to petitions for reconsideration, filed on April 13, 1998. Other aspects of the rules are currently under review in the United States Court of Appeals for the Eleventh Circuit in *Gulf Power Company, et al. v. FCC*, Case No. 98-6222, *et al.*

In addition to the rulemaking proceedings, a number of electric utilities, including some who assisted in the development of these Comments, have a case pending in the Eleventh Circuit setting forth a facial challenge to the constitutional validity of the nondiscriminatory access provisions of Section 224(f) of the Pole

Attachments Act.[9]

Now, with three rulemakings and a constitutional challenge still pending either before the Commission or in the courts, the Commission proposes to issue additional pole attachment rules in yet another rulemaking proceeding. The Commission seeks to bootstrap new and unwarranted readings of the pole attachments statute onto earlier unwarranted readings of the statute that do not stand scrutiny. In the event earlier Commission rules are vacated or reversed, either by the FCC on reconsideration or by the courts, or Section 224 is declared unconstitutional, much of what the Commission is proposing in this rulemaking with regard to Section 224 will have to be redone.

Rational agency practice mandates that the three pending pole attachment rulemakings should be concluded and subjected to judicial review before the Commission embarks on yet another round of Section 224 rulemaking. The same applies with respect to the constitutional challenge to the statute. The unsettled state of the pole attachment statute's implementation creates considerable hardships for utility companies. The

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[9] *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fl. 1998), No. 98-2403 (11th Cir. argued Feb. 25 1999). The comments expressed herein are not intended, and should not be construed, to waive any rights or arguments the Electric Utilities may have with regard to either the rulemaking proceedings or the constitutional challenge to the statute. These comments should not be read to suggest that the nondiscriminatory access provisions of the Pole Attachments Act are constitutional or that any rate developed pursuant to that statute constitutes "just compensation" in a constitutional sense. The Electric Utilities expressly reserve any and all legal, equitable or constitutional rights, including, but not limited to, the rights arising under the Fifth Amendment of the Constitution not to have their property taken without just compensation with regard to all pole attachment matters, whether before the Commission or in a court of law.

interests of justice and fundamental fairness dictate that the Commission should come to closure on the pending rulemakings and permit them to be reviewed by the courts before engaging in additional rulemaking on Section 224.

II. INTRODUCTION

In this rulemaking, the Commission addresses problems of access by competitive telecommunications providers to multiple tenant environments, such as apartment and office buildings, office parks, shopping centers and manufactured housing communities. Specifically, the Commission notes that a number of parties have observed that "building owners and incumbent LECs have obstructed competing telecommunications carriers from obtaining access" to facilities in multiple tenant environments.[10] The Commission asserts that this "obstruction" conflicts with its broad policy objective of fostering facilities-based competition with incumbent LECs, in particular, by wireless competitive access providers.[11] Wireless competitive providers seek access to rooftops for placing fixed wireless antennas, along with inside wiring, riser cables, telephone closets and network interface devices.[12] The Commission sets forth a series of proposals aimed at ensuring that "incumbent LECs and property owners" do not "unreasonably

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[10] *NPRM* ¶ 31.

[11] *NPRM* ¶ 19.

[12] *Bringing Telecommunications Competition to Tenants in Multi-Tenant Environments*, prepared by Willkie Farr & Gallagher on behalf of ALTS, Nextlink, PCIA, Teligent and WinStar, at 8 (submitted to the FCC on May 10, 1999) (the "*White Paper*").

obstruct" the ability of wireless competitive providers and others to provide service to multiple tenant environments.[13]

III. ACCESS TO MULTI-TENANT ENVIRONMENTS SHOULD BE ADDRESSED THROUGH SECTION 251, NOT SECTION 224

The Electric Utilities do not agree with the Commission's premise in this proceeding that regulatory intervention is required to assist telecommunications carriers to obtain leases for their telecommunications equipment.[14] Furthermore, to the extent the Commission believes a problem exists, it identifies this problem to be alleged obstructionist conduct by multi-tenant *building owners* and *incumbent LECs*, not electric utilities.[15] Nonetheless, the

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[13] *NPRM* ¶ 35.

[14] Indeed, Chairman Kennard cautioned against excessive regulation in nascent markets in his recent address to the National Cable Television Association in Chicago. "[W]e can't predict where this [broadband] market is going . . . [A] deregulatory approach . . . will let this nascent industry flourish." William E. Kennard, *The Road Not Taken: Building a Broadband Future for America*, Speech to the National Cable Television Association, Chicago, Il. (June 15, 1999). Chairman Kennard sounded a similar theme in an interview broadcast on August 6 on Ziff-Davis Television's "Big Thinkers." "People are coming to Washington . . . and they're saying 'Regulate, regulate. Intervene in the marketplace.' We don't know exactly what this marketplace is going to look like yet. . . . [L]et's not put a pall of regulation over this whole marketplace until we know how it's going to take shape." *Transcript from William Kennard,* Big Thinkers, July 23, 1999 <web.zdnet.com/zdtv/bigthinkers/thisweeksbigthinker/story/0,6917,2300978,00.html> Chairman Kennard's perspective on regulation runs directly counter to the proposed new regulation set forth in this rulemaking proceeding.

[15] "In several proceedings before the Commission, a number of parties have argued that both *building owners* and *incumbent LECs* have obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises." *NPRM* ¶ 31 (emphasis added). "[W]e address herein several potential requirements to ensure that *incumbent LECs* and *property owners* do not unreasonably obstruct the availability of facilities-based competitive telecommunications services to customers located in multiple tenant environments." *NPRM* ¶ 35 (emphasis added).

solution proposed by the Commission includes the application of the Pole Attachments Act, Section 224 of the Communications Act of 1934, as amended, which includes both LECs and electric utilities, to multiple tenant environments. However, since electric utilities are not part of the problem, if indeed such a problem exists,[16] there is no reason why electric utilities should be swept up in the Commission's proposed solution. In this context – the Commission's proposals regarding access to multi-tenant environments – electric utilities are dolphins caught in a tuna net.

Given there is no basis for including electric utilities in the solution to this alleged problem, if mandatory access can be legally justified at all, it should be through the application of Section 251 to multi-tenant environments, not Section 224.

Section 251(b)(4) mandates access consistent with the requirements of Section 224,[17] but applies only to local exchange carriers, and not to electric utilities.[18] While the

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[16] By their own account, competitive carriers are gaining access to buildings under normal commercial arrangements. For example, WinStar, a CLEC in thirty-six states and the District of Columbia, routinely announces its success in developing its business through new building access agreements. *See, e.g.,* WinStar Communications, Inc., Securities and Exchange Commission Form 10-K (filed Mar. 31, 1999); *WinStar Reports First Quarter Results,* Company Press Release May 12, 1999 (WinStar has an "industry-leading number of access rights to buildings in key U.S. markets"); Teligent Inc., Securities and Exchange Commission Form 10-K405 (filed Mar. 29, 1999).

[17] Section 251(b)(4) provides that a LEC has "the duty to afford access to the poles, ducts, conduits and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224."

[18] In contrast to Section 224, Section 251 applies to local exchange carriers even where they do not use their poles, ducts, conduits or rights-of-way for *wire* communications. 47 U.S.C. § 251(b)(4). Thus, Section 251 applies to a broader universe of LECs, including wireless LECs, than Section 224. *See Local Competition Order* ¶ 119.

FCC is still constrained by the statutory definitions imposed in Section 224, to the extent that the agency wishes to address LEC behavior, Section 251 is a more appropriate route. Alternatively, the FCC may have a basis for requiring incumbent local exchange carriers to unbundle riser cable and wiring within multi-tenant buildings under Section 251(c)(3).

Either approach under Section 251 recognizes the inherent safety and engineering problems, discussed below, of having electric wires and communications wires in close proximity. The application of Section 251 rather than Section 224 is a focused and efficient agency response to any access problem.

IV. PATHWAYS USED TO RUN ELECTRIC WIRES IN MULTI-TENANT BUILDINGS ARE NOT AMENABLE TO THE ACCESS REQUIREMENTS OF SECTION 224

Electric service is provided to multiple tenant environments in many different configurations. It is important for the Commission to recognize that in most cases, *all* of the electric company's equipment and wires are located *outside* the building. The electric utility company-owned facilities terminate outside the buildings at locations such as a meter enclosure, padmounted transformer, customer-supplied weatherhead, or customer-supplied switchgear. In cases where the electric utility company facilities extend into the building, which occurs particularly in multi-story buildings of significant height, the utility's high voltage cables are run inside the building through raceways and space provided by the building owner, to utility-owned transformers in customer-supplied transformer vaults or installations. These transformer installations may be on the roof to

run chillers and on intermediate floors to run elevators and general building switchgear for lighting and the like. The electric utility's wires terminate in the transformers or switch cabinets or meter enclosures. From this "delivery" or "demarcation" point to the customer premises, the electric wiring is owned by the customer, not the utility. This is a critical point, as it is important to recognize that the pathways occupied by the electric utility do not reach all the way to the customer. Rather, they extend only to the delivery point, *typically outside the building*, after which the electric wires and the raceways they occupy are owned and controlled by the customer/building owner.[19]

A. Safety and Engineering Considerations Mandate that Communications Wires and Electric Wires Be Kept Separate

The Commission proposes that the pathways used to run electric wires in multi-tenant buildings should be deemed "conduits" or "rights-of-way" as used in Section 224 and thus be subject to the statute's access requirements.[20] The Commission's proposal is without merit.

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[19] This is in contrast to the cable and telecommunications industry practice under which these service providers generally claim that they own or control the in-building wires used to deliver services to subscribers in multiple tenant buildings. *See, e.g.*, 47 C.F.R. § 76.800-806; *In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 95-184 and MM Docket No. 92-260, *Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 3659 (1997); *See also* Comments of Adelphia Communications Corp., CS Docket 95-184 (filed Mar. 18, 1996)("Cable home wiring is the personal property of the cable operator."); Comments of the Cable Telecommunications Association., CS Docket 95-184 (filed Mar. 18, 1996)("[I]n most situations the wiring belongs to the cable operator.").

[20] *NPRM* ¶ 44.

Currently, telecommunications wires and electric wires take entirely separate pathways in multi-tenant buildings. This is not an accident. There are vital safety and engineering concerns that mandate this result. With some exceptions for non-conductive fiber, communications wires are not permitted physically to occupy the same pathway as electric wires.

This is clearly reflected in the National Electric Code ("NEC"), which in most circumstances establishes safety standards for electric facilities *inside* buildings. A separate code, the National Electrical Safety Code or NESC, establishes safety standards *outside* buildings.

The NEC uses the term "raceway" to denote pathways inside buildings that can contain wires. The NEC defines raceway as follows:

> An enclosed channel of metal or nonmetallic materials designed expressly for holding wires, cables, or busbars, with additional functions as permitted in this Code. Raceways include, but are not limited to, rigid metal conduit, rigid nonmetallic conduit, intermediate metal conduit, liquidtight flexible conduit, flexible metallic tubing, flexible metal conduit, electrical nonmetallic tubing, electrical metallic tubing, underfloor raceways, cellular concrete floor raceways, cellular metal floor raceways, surface raceways, wireways, and busways.[21]

Raceways would include "riser conduit" as that term is used by the FCC in the *NPRM.*

The NEC makes clear that communications wires and communications facilities must be kept separate from energized electric wires. This is done for at least two reasons. One is that running a conductive communications cable in the same raceway as an electric

[21] NEC 1999, NFPA 70 National Electric Code International Code Series, at 70-23.

conductor could subject the communications cable to electrical faults. While the electric cables within buildings are protected from overcurrent by fuses, breakers or other devices required by the NEC, interior communications systems may not be protected from interior building faults. The NEC does not contain specific requirements for the protection of the interior communications systems from being energized by interior electrical faults, because it requires their isolation from electric light and power conductors. The consequences of an electrical fault energizing the communications facilities produces a number of potential hazards to persons or property, including, *inter alia*, damage to the communications network vital to obtaining emergency response and electrocution of communications users. The second reason for ensuring that communications facilities are separated from energized electric facilities is for worker safety and protection. Communications workers are not trained to work in highly dangerous, energized environments. Only qualified electrical workers are permitted to work, for example, in transformer vaults and on other electric utility facilities within a building.

There are a number of provisions in the NEC that reflect the principle that communications facilities and electric facilities must be kept separate. Section 800-11(a) provides that if an electric utility enters a building through underground pathways, its electrical cables must be separated from communications cables by fire resistant materials or a barrier.[22] If the utility cables terminate in a panelboard or switchgear, this facility

[22] NEC 1999, National Electric Code Handbook § 800-11(a).

must be housed in a separate space, isolated from communications cables and equipment, pursuant to Section 110-26(f) for under 600 volts and 110-34(f) for over 600 volts.[23] If the utility cables terminate in a vault, no foreign pipe or duct can enter or pass through a vault pursuant to Section 450-47.[24] Communications conductors shall not be placed in any raceway, compartment, outlet box, junction box, or similar fitting with electric conductors pursuant to Section 800-52(a)(1)(c)(1).[25] Electric and communications conductors are to be kept physically separate. The same is true for network-powered broadband communications cables and equipment, which are to be kept physically separate under Section 830-58.[26]

In short, there are profound safety and engineering considerations, developed over years of experience, that mandate that communications wires and equipment be kept separate from electric wires and equipment. Transgressions of this fundamental principle can result in equipment damage, fire, or personal injury.

B. Electric Utilities Do Not Have a Legal Right To Permit Communications Carrier Access To Pathways In Multi-Tenant Buildings

The terms and conditions under which an electric utility is granted the right to occupy space in multiple tenant buildings typically are set forth in service tariffs the

[23] *Id.* § 110-26(f) and § 110-34(f).

[24] *Id.* § 450-47.

[25] *Id.* § 800-52(a)(1)(c)(1).

[26] *Id.* § 830-58.

utility files with the state public service commission. These service terms set forth how the electric utility will be given building access when the building owner decides to order electric service initiation. The tariff terms then become the binding agreement with the building owner that governs the service provided to a particular building.

A typical set of service tariffs permitting access for lines and equipment "necessary or incidental" to the furnishing of energy-related service is attached.[27] This is typical of service tariffs across the country, where access grants are limited to equipment that is necessary or incidental to the furnishing of electric service.

These service tariffs set forth the standard contractual rights between the service provider and customer and have none of the formalities associated with creating an interest in real property equivalent to a right-of-way. Because they do not, of course, Section 224, by its terms, does not apply.

Even assuming, *arguendo*, that a right-of-way was created, this does not provide a legal basis for electric utilities to grant third party carriers the right to run communications wires in these pathways. As explained below, the scope of a right-of-way is defined by the terms of the grant.[28] In the case of the attached service

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[27] *See* Duke Power Company Service Regulations, Section V (Exhibit A).

[28] *Stoesser v. Shore Drive P'ship,* 494 N.W.2d 204, 208 (Wisc. 1993); *Burns v. Alderman,* 838 P.2d 878, 882 (Idaho App. 1992); *Commercial Wharf E. Condo. Ass'n v. Waterfront Parking Corp.,* 552 N.E.2d 66, 76 (Mass. 1990)(the scope of an easement "is regulated by the intent of the parties as manifested by the language of the grant"); *see generally Thompson on Real Property* § 60.04(a).

regulations and other similar documents across the country, the grant of access for the electric utility is limited to lines and apparatus "necessary and incidental" to the delivery of electric service.[29] Since the electric utility's right of access is limited to the delivery of electric service, the electric utility does not have the power to convey a right of access to the pathways it occupies for some other purpose to a third party, such as the delivery of communications services. The electric utility cannot convey a property right that it does not possess. A communications provider must obtain that permission from the building owner, who owns and controls the building's internal pathways.[30]

V. THE RIGHT TO PLACE AN ANTENNA ON A ROOFTOP IS NOT A RIGHT-OF-WAY

The Commission proposes to characterize the right to place an antenna on a rooftop as a "right-of-way" within the meaning of Section 224. However, the right to place an

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[29] *See* Duke Power Company Service Regulations, Section V (Exhibit A).

[30] The Commission also proposes that "riser conduit" in multiple tenant buildings is "conduit" "owned or controlled" by a utility within the meaning of Section 224. This proposal is without merit. As the FCC itself acknowledges, the legislative history of Section 224 makes clear that Congress intended to refer to *underground* pathways when it used the term "conduit." *NPRM* ¶ 44. The term "conduit" is not so unambiguously clear that one can rely solely on the "plain language" of the statute and ignore the clear and unequivocal legislative history that establishes that conduits are meant to be underground. Moreover, even assuming, *arguendo*, that raceways are "conduit" within the meaning of the statute, they typically are not owned or controlled by the electric utility. The internal pathways in a multiple tenant building are owned and controlled by the building owner. An electric utility has a limited right of access to these pathways for the provision of electric service. The electric utility does not have a property or contractual right to convey access to third parties for communications services.

antenna on a rooftop is *never* a right-of-way. The grant of the right to place an antenna on a rooftop takes the form either of a license or a lease. As explained below, neither of these is a right-of-way.

The starting point for analysis of the Commission's proposed interpretations of "right-of-way" is the meaning of the term as used in the statute. It is a well-established rule of construction that where Congress uses terms that have a settled meaning under the common law, Congress is considered to have incorporated the established meaning of these terms into its statutes.[31] The Commission does not have the power to enlarge or diminish the common law meaning of "right-of-way" through its rulemaking process. [32]

The concept of a "right-of-way" has an old and well established meaning under common law. A right-of-way simply means the right to pass over the land of another.[33] Under the line of Supreme Court cases cited in Footnote 31, Congress must be

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[31] *Neder v. United States*, 119 S.Ct. 1827, 1839 (1999); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *see Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911) ("Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense.").

[32] In the *NPRM*, the Commission asks for comments on whether it is appropriate for the Commission to offer "guidance" regarding the existence and scope of ownership and control of a right-of-way, or whether the Commission should defer entirely to state law. *NPRM* ¶ 47. The FCC is interpreting a term from a federal statute – right-of-way – whose meaning as used in that statute is defined by state law. In so doing the Commission must defer entirely to state law, since "right-of-way" as used in the statute is a state law concept.

[33] *The People ex rel. E.P. Bryan et al. v. State Board of Tax Commissioners*, 67 Misc. 508, 509 (N.Y. Sup. Ct. 1910), *aff'd* 127 N.Y.S. 858 (N.Y. App. Div. 1911); *Ryder v. Petrea*, 416 S.E.2d 686 (Va. 1992); *Fresno Street Railroad Co. v. Southern Pacific Co.*, 67 P. 773 (Cal. 1901).

considered to have incorporated into Section 224 the existing common law meaning of the term "right-of-way" at the time of the Pole Attachments Act's initial passage in 1978 and at the time of its subsequent amendment in 1996.

A right-of-way is a form of easement.[34] An easement is one of several ways in which one may obtain rights in the land of another, for the benefit of one's own property or for one's own personal benefit.[35]

An easement is a property right, rather than a contract right.[36] As a property right, the same formalities must be observed in creating an easement as are followed in

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[34] *Fresno Street Railroad Co.*, 67 P. at 773 (describing a right-of-way as "an easement in its simplest form, a mere right to pass over the land of another"); *Wylie v. Tull*, 769 S.W.2d 409 (Ark. 1989); *Kurz v. Blume*, 95 N.E.2d 338 (Ill. 1950); *Pasadena v. Michigan Land & Water Co.*, 110 P.2d 983 (Ca. 1941). In some circumstances, there is uncertainty whether a grantor intended to grant a fee simple or an easement. There, courts look to whether terms such as "right-of-way," "road" or "roadway" are used in the granting document. Where they are, this is a "strong, almost conclusive, indication that the interest conveyed is an easement." *Hartman v. J & A Dev. Co.*, 672 S.W.2d 364, 365 (Mo. App. 1984); *Meyerink v. Northwestern Pub. Serv. Co.*, 391 N.W.2d 180, 182 (S.D. 1986).

[35] *Thompson on Real Property* § 60.02(a) (Michie 1994 & Supp. 1998). The *Restatement of the Law of Property* defines an easement as "an interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; (b) entitles him to protection as against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land; (d) is not a normal incident of the possession of any land possessed by the owner of the interest, and (e) is capable of creation by conveyance." *Restatement of the Law of Property* § 450 (1944). The Idaho Supreme Court defined an easement as "the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property owner." *Abbott v. Nampa Sch. Dist. No. 131*, 808 P.2d 1289, 1293 (Idaho 1991). In Massachusetts, the Court characterized an easement as "an interest in land which grants to one person the right to use or enjoy land owned by another." *Commercial Wharf E. Condo. Ass'n v. Waterfront Parking Corp.*, 552 N.E.2d 66, 73 (Mass. 1990).

[36] *Magna, Inc. v. Catranis,* 512 So.2d 912 (Ala. 1987); *Skidmore v. First Bank of Minneapolis*, 773 P.2d 587, 589 (Colo. App. 1988), *cert. denied* 790 P.2d (Colo. 1990); *Burris v. Cross*, 583 A.2d 1364, 1377 (Del. Super. Ct. 1990); *Hayes v. Gibbs,* 169 P.2d 781 (Utah 1946).

creating other property rights; for example, the Statute of Frauds must be satisfied.[37]

The right in land held by an easement owner differs from a fee interest or even a leasehold interest in that it is a "use" interest, not a "possessory" interest in land.[38] An easement is an "incorporeal" interest.[39] The fee or leasehold owner retains all the incidents of ownership that do not contradict the particular rights of the easement holder.[40]

An easement, which is a property interest, is distinguished from a mere license, which is not a property interest.[41] The Restatement of Property defines a license as an interest in land that entitles its owner to a use of the land arising from the consent of the one whose use of the land is affected by the licensee's actions, but it is "not incident to an estate in the land, and . . . it is not an easement."[42] Unlike an easement, a license can be established by an oral agreement.[43] A license is revocable; an easement is not.[44] Unlike an easement, a license is terminable at the will of either party, does not pass at death, terminates upon conveyance of the land, and is an agreement binding only upon the

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[37] *Darsaklis v. Schildt*, 358 N.W.2d 186, 190 (Neb. 1984); *Berg v. Ting*, 886 P.2d 564, 568-69 (Wash. 1995).

[38] *Thompson on Property* § 60.02(c).

[39] *Id.* § 60.02(d).

[40] *Id.*

[41] An easement "is distinguished from a license because a license is not an interest; a license is merely a privilege to do some act on the land without possessing an interest in the land." *Kuhlman v. Rivera*, 701 P.2d 982, 985 (Mont. 1985).

[42] *Restatement of Property* § 512 (1944).

[43] *Id.* § 512 cmt. c.

[44] *Champaign Nat'l Bank v. Illinois Power Co.*, 465 N.E.2d 1016, 1019 (Ill. App. 1984).

parties.[45]

The scope of an easement is established by the granting document.[46] An easement is construed "in connection with the intention of the parties, as evidenced by the language employed and the circumstances in existence at the time the easement was granted."[47]

As stated above, the right to place an antenna on a rooftop is *never* a right-of-way. The right to place an antenna on a rooftop is either a license or a lease. Neither of these is a right-of-way. A right-of-way is a property interest. A license is not a property interest; it is a permission to do something on another's land without having an interest in the land.[48] A right-of-way is a *nonpossessory* interest, whereas a leasehold interest is a *possessory* interest.[49] In short, rights-of-way, licenses and leases are three entirely distinct concepts. Accordingly, the FCC's effort to characterize the right to place an antenna on a rooftop as a "right-of-way"[50] is contrary to law.

Even assuming, *arguendo*, that the document granting a wireless carrier the right to place an antenna on a rooftop was construed to convey a right-of-way, the

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[45] *Weir v. Consolidated Rail Corp.*, 465 N.E.2d 1341, 1345 (Ohio 1983).

[46] *Stoesser v. Shore Drive P'ship*, 494 N.W.2d 204, 208 (Wisc. 1993).

[47] *Burns v. Alderman*, 838 P.2d 878, 882 (Idaho App. 1992).

[48] *Thompson on Real Property* § 60.03(a)(7)(iv).

[49] *Id.* § 60.02(c).

[50] *NPRM* ¶ 42.